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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1976
No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,

Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF GOVERNOR OF THE STATE OF WASHINGTON AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR CERTIORARI

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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I.

INTEREST OF AMICUS CURIAE

The State of Washington ranks sixth of all the states in the number of Indians residing within state boundaries. Approximately one percent of the state's total population is Native American. The relationship between the Indian tribes of Washington State and state and local governments, particularly with respect to the peace and security of Indian and non-

Indian citizens on Indian reservations, has been a subject of particular concern to the Governor.

In 1957, in accordance with Federal and Washington State legislative authorization, and a request by the Tribe, the State of Washington assumed jurisdiction over the Port Madison Indian Reservation of the Suquamish Tribe by a proclamation of the then Governor Albert D. Rosellini.[1] This assumption of jurisdiction occurred at a time when federal Indian policy favored "termination" of Indian tribal authority.[2]

In the period following the assumption of jurisdiction by the state, difficult problems of law enforcement on Indian reservations, including the Port Madison Indian Reservation, arose. The Washington State Legislature provided no additional funding for county or local governments to assist them in the extension of their law enforcement and other responsibilities to Indian reservations within their own jurisdictions. Complaints about inadequate law enforcement on Indian reservations within Washington State were frequent and strong, and documented in both Congressional hearings and in statements received

[1]All references herein to "Appendix" are to the appendices to the Petition for Writ of Certiorari. Congressional Authorization for the assumption of jurisdiction by the state was granted through Public Law 83-280, 67 Stat. 588 (1953), Appendix B, pp. 24-26; state legislative authorization through Revised Code of Washington Chapter 37.12 (1957), Appendix B, pp. 32-33; Suquamish Tribal request to state, Appendix B, p. 31; Proclamation of Governor Rosellini of May 15, 1958, Appendix B, p. 32.

[2]As recently as 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies.

by the Washington State Indian Affairs Task Force, a joint project of the Governor's Urban Affairs Council and the Governor's Indian Advisory Committee.[3]

In the late 1960's, both federal and state Indian policy shifted away from termination and assumption of jurisdiction by states, and toward the recognition of tribal sovereignty and the encouragement of tribal self-government. The possibility of returning to the United States jurisdiction previously assumed by a state was created by the passage of the Act of April 11, 1968, 82 Stat. 79, 25 U.S.C. § 1323, authorizing the United States to accept retrocession. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, provided that [n]o Indian tribe *in exercising the powers of self-government* shall * * *" (emphasis supplied). The Act proceeded to enumerate the basic rights which no Indian tribe could deny "any person". The President, in his message to Congress of July 8, 1970, flatly rejected the policy of termination and called instead for "* * * a new era in which the Indian future is determined by Indian acts and Indian decisions."[4] Subsequent Congressional legislation, such as the Indian Financ-

[3]The statements given to the Washington State Indian Affairs Task Force are summarized in its 1971 report entitled *"Are You Listening Neighbor? . . ."* Illustrative testimony concerning inadequate state law enforcement on Indian reservations is found in Hearings Before the Subcommittee on Indian Affairs, on S. 2010, the Indian Law Enforcement Improvement Act of 1975, 94th Cong., 2nd Sess., U.S. Government Printing Office (1976) [hereinafter cited as 1975 Hearings].

[4]H.R. Doc. No. 91-363, 91st Congress, 2nd Sess. (1970): 116 Cong. Rec. 23131 (1970).

ing Act of 1974, 25 U.S.C. § 1451 *et seq.*, has also reflected and demonstrated the national policy favoring the strengthening of tribal governments.

In Washington State, the policy of the executive branch of state government similarly supports Indian self-determination. The Governor has supported the retrocession of jurisdiction. Consistent with that policy, when the Suquamish Tribe requested such retrocession in 1971,[5] Governor Evans issued a proclamation retroceding state jurisdiction to the United States.[6]

The policy of the Governor was set out for Congress in a statement presented on his behalf by his Administrative Assistant, James Dolliver, in hearings on the Indian Law Enforcement Improvement Act of 1975:[7]

> Our policy is, and has been, for the last nearly seven years, one of accepting, recognizing, and respecting the Tribal governments as the political, governing bodies of sovereign nations. This policy is based on the concept of self-determination of Tribal governments and the necessity for the state to have a two-way street of communication and coordination with Indian Country for its implementation.

Consonant with the state's executive policy, a number of legislative acts have recognized the desirability of treating Indian tribes as local governmental units. The Interlocal Cooperation Act, for example, includes in its definition of "public agency", any Indian tribe recognized as such by the federal government.[8] The Economic Assistance Act of 1972, authorizes the economic assistance authority "* * * to make direct grants and/or loans to political subdivisions of the state and Indian tribes recognized as such by the federal government * * *."[9] Similarly, the 1972 legislature amended the statute providing for funding of outdoor recreation programs of "public bodies" to include "Indian tribes now or hereafter recognized as such by the federal government."[10]

As noted in the Governor's motion for leave to file this amicus curiae brief, under the Washington State Constitution, "[t]he supreme executive power of this state shall be vested in a governor. * * *"[11] By statute, "[the governor] is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States."[12] Washington State was the first state to establish an executive Office of Indian Affairs with a Special Assistant to the Governor for Indian Affairs. The Governor is further ad-

[5]Resolution of Suquamish Tribe of January 11, 1971, Appendix B, pp. 34, 35.

[6]Appendix B, pp. 35, 36. The acceptance of the retrocession by the United States, through the Secretary of the Interior, is found in Appendix B, p. 36.

[7]1975 Hearings, *supra*, note 3, at 489.

[8]Revised Code of Washington, Chapter 39.34.020.

[9]Revised Code of Washington, Chapter 43.31A.070.

[10]Laws of 1972, Chapter 56, codified as Revised Code of Washington, Chapter 43.99.020.

[11]Article III, Section 2.

[12]Revised Code of Washington, Chapter 43.06.010.

vised by the Governor's Indian Advisory Council.[13] Consistent with the state's policy supportive of Indian self-determination, the membership of this council is chosen by the state's urban, reservation, and non-reservation Indian populations themselves. The Governor's office has also participated in the work of the Governor's Interstate Indian Council, an informal advisory group which has also supported Indian self-determination and the retrocession of state jurisdiction over Indian lands.

II.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

The decision of the Ninth Circuit affirms long standing legal principles, and is wholly consistent with the previous decisions of this Court, and with federal and Washington State executive and legislative policy. First and foremost, it affirms the principle that Indian tribes retain those powers of self-government that are not expressly terminated by Congress.[14] Petitioner has pointed to no act of Congress depriving tribal courts of jurisdiction over offenses committed on tribal lands in violation of a

[13]The Governor's Indian Advisory Council was established by Executive Order 72-11, October 30, 1972, and directed to examine and define issues pertaining to the rights and needs of American Indians of the State of Washington, and to make recommendations to the governor and to state agencies with respect to desireable changes in program, policies, and law.

[14]*Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 560-61 (1833); *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1, 17-18 (1831); *Williams v. Lee*, 358 U.S. 217 (1959).

valid law and order code.[15] Rather than representing a radical departure from established law, the Ninth Circuit decision complements this Court's previous decisions involving the jurisdiction of tribal courts over non-Indians on tribal lands,[16] In *Williams v. Lee*, *supra*, note 14, characterized as a "landmark decision" in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, at 171 (1973), tribal court jurisdiction over a non-Indian was upheld with reasoning that is indistinguishable from that which must apply to the present case.

In considering whether or not to grant this petition for certiorari, it should be noted that the decision appealed from is not in conflict with any decision of another court of appeals on the same matter, is not in conflict with any applicable state law, is not in conflict with any principle of law articulated by this Court, and does not represent a departure from the accepted and usual course of judicial proceedings.

The amicus curiae brief of the Washington State

[15]The dissenting opinion of Judge Kennedy, after an extensive analysis of federal legislation, acknowledges that Congress has never explicitly withdrawn tribal jurisdiction.

[16]The Ninth Circuit's holding in the *Oliphant* case extends only to "* * * the jurisdiction of an Indian tribe over non-Indians who commit crimes *while on Indian tribal land* within the boundaries of the reservation." (Opinion, page 1; Appendix A, page 8 [emphasis added]). The amicus curiae brief of the Washington State Attorney General gives the holding too expansive a reading in suggesting its applicability to non-trust as well as tribally owned or other trust land. The Governor expresses no view on tribal jurisdiction over the acts of non-Indians on non-trust land, believeing that question not to be properly before the Court. While the petition of Mr. *Belgarde* does involve non-trust land, for the reasons stated in the Brief of Respondents, the Governor agrees that the issue should not be addressed by this Court until the Ninth Circuit has had the opportunity to consider it.

Attorney General suggests, at page 11, that the 1878 district court decision in *Ex Parte Kenyon*, 14 Fed. Cas. 353, "* * * has represented the law on this subject for nearly 100 years." However, as this Court noted in *Elk v. Wilkins*, 112 U.S. 94 (1884), the *Kenyon* decision concerned an activity that occurred *outside* a reservation. Similarly, the statement in the dissenting opinion below that "* * * virtually no white man appears to have been tried by an Indian tribunal in the past century * * *" (Appendix A, p. 27) is without basis in the record or in fact.[17] In Washington State alone, a number of Indian tribes routinely try and penalize non-Indians for offenses against their tribal law and order codes.[18] It is the belief of the Governor that this development has and will continue to contribute to the peace and security of all the citizens of this state and will con-

[17]The dissenting opinion appears to have drawn this inference from the absence of federal decisions on the subject. However, after this Court's decision in *Talton v. Mayes*, 163 U.S. 376 (1896), and until the Indian Civil Rights Act of 1968, 25 U.S.C. § 1303, no mechanism existed to allow the federal courts to review the assertion of jurisdiction by an Indian tribe over a non-Indian.

[18]The fact that a number of tribes in Washington State (including tribes over whose reservations the state assumed jurisdiction under Public Law 83-280, and tribes over whose reservations the state's assumption of jurisdiction was retroceded to the United States) routinely assert jurisdiction over non-Indians for offenses against their law and order codes on tribal lands, without particular problems or objections, was confirmed in inquiries by the Special Assistant to the Governor for Indian Affairs to tribal attorneys, tribal officials, and officials of the Bureau of Indian Affairs in the Portland, Oregon, area office and the Western Washington Agency in Everett, Washington. The Governor believes that one of the reasons this Court should decline to review the present case is the absence of a record to demonstrate the extent to which and the manner in which Indian tribes have been exercising such jurisdiction. All such jurisdiction is, of course, exercised subject to the 1968 Indian Civil Rights Act, 25 U.S.C. §1302, limiting the penalty or punishment by tribes to fines of no more than $500 and imprisonment for no more than six months, and guaranteeing defendants due process rights.

tribute to the clarification of inter-governmental relationships that will ultimately have to be resolved by Congress.

The decisions of this Court have repeatedly recognized that the Congress has the power to define the relationship between the Indian tribes, the states, and the United States. The statement presented on behalf of Governor Evans in the Hearings on the Indian Law Enforcement Act of 1975, referred to above, suggest that further definition of these relationships should be made by Congress, not by the courts:[19]

> Congress must look carefully at federal Indian policy and consider the practical effect on state laws and on all state citizens. The issues of federal, state and Indian relationships can not and should not be settled in court. Rather, this is one area that will require bold, concise and equitable policy by Congress in the most expeditious way possible.
>
> The State of Washington fully believes in self-determination for the Indian people in its state. By the accident of geography both Indian and non-Indian live within the borders of the same state. To live together in peace and harmony, to be mutually supportive and to determine our own future is the goal of Indian and non-Indian alike. While treaties will continue to be subject to judicial and congressional interpretation, and while there will continue to be the tensions between different jurisdictions, we have far more that unites us and far more reason for cooperation than confrontation. There is no more urgent role for Congress to fulfill than to work with federal agencies, Indian people, states and

[19]1975 Hearings, *supra*, note 3, at 493.

local governments to define clearly and accurately the jurisdictional and governmental relationships. With this we believe the full resources of state services can be made available to Indian people and the goal of Indian self-determination and self-sufficiency can be attained.

The holding of the Ninth Circuit in this instance is consistent with and bolsters the present policy of the State of Washington to bring tribal government more closely within the fabric of inter-governmental relationships and powers, and assures to the tribes the jurisdiction over their own lands which is a necessity for the assumption of responsible self-government.

Governor Evans believes that the denial of a writ of certiorari in this case will leave a governing principle of law that is clear, sound, and fair. In the unlikely event that another court of appeals were to reach a contrary conclusion, this Court could resolve the conflict with the advantage of having additional facts and experience concerning the assertion of jurisdiction over non-Indians by tribal courts that, presumably, will develop in the coming years. In the meantime, if Congress wishes to clearly establish a different rule, it can do so after viewing the experience with those tribes which prepare themselves to and do exercise jurisdiction over acts committed upon tribal lands.

III.

CONCLUSION

For the foregoing reasons, Governor Evans asks the Court to deny this petition for writ of certiorari.

DATED this 11th day of January, 1977.

Respectfully submitted,

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I hereby certify that on this 11th day of January, 1977, I served a copy of the Brief of Governor of the State of Washington as Amicus Curiae in Opposition to Petition for Certiorari by mailing, postage prepaid, to Philip P. Malone, Attorney at Law, 153 First Avenue, Poulsbo, Washington 98370, attorney for petitioners; Ron Sims, Acting United States Attorney, 1012 U.S. Courthouse, Seattle, Washington; Richard Neely, Regional Solicitor, Department of the Interior, P.O. Box 3621, Portland, Oregon; Robert H. Bork, Solicitor General, Room 5143, Justice Building, Washington, D.C.; John C. Merkel, Kitsap County Prosecuting Attorney, Kitsap County Courthouse, 614 Division Street, Port Orchard,

Washington 98366; and Barry Ernstoff, Ziontz, Pirtle, Morisset, Ernstoff and Chestnut, 200 Pioneer Building, 600 First Avenue, Seattle, Washington 98104. I further certify that all parties required to be served have been served.

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